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Supreme Court of the United States

No. 662—October Term, 1959

ROBERT CUSHMAN MURPHY and others,
Petitioners,

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States,
Defendant,

and

LLOYD BUTLER, Area Supervisor, Plant and Pest Control Division of the United States Department of Agriculture, and DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Respondents.

BRIEF OF COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, IN OPPOSITION TO PETITION FOR CERTIORARI

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Reported below: 270 F. 2d 419.

Since the principal respondent in this suit in equity by whose acts the petitioners (plaintiffs below) deem themselves aggrieved is an agent or employee of the Department of Agriculture, we deem it appropriate to leave upon the capable shoulders of the Solicitor General of the United States the main burden of opposing the instant petition.

However, the petitioners, in the first of the six headnotes in their brief, make the astonishing contention that the Court below should have held the Commissioner of Agriculture and Markets to be without power to authorize the

United States Department of Agriculture to take measures against the gypsy moth in the State of New York.

Our brief will be devoted solely to a refutation of this proposition.

ARGUMENT

The Commissioner of Agriculture and Markets of the State of New York had authority under New York law to take measures against the gypsy moth. This included the power to cooperate to this end with the Federal authorities.

(1)

The powers of the Commissioner of Agriculture and Markets in the premises are set forth in Agriculture and Markets Law (Consol. Laws, ch. 69) § 164. The essence of this section is found in sub-section 1, which reads as follows:

> "1. The commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects or plant diseases existing within the state."

In § 3 of the same chapter, the Legislature has declared that the chapter and related laws "are to be deemed an exercise of the police power of the state and a discharge of its obligations for the promotion of the general welfare * * *" and "should receive a liberal interpretation and application in furtherance of" their policy and purposes.

(2)

In his answer, the Commissioner of Agriculture and Markets alleged (Pl. App., pp. 33a-34a):

"Eleventh: That in an attempt to control and eradicate the diseases in the trees, plants and vegetation caused by the gypsy moth in the Counties of Suffolk and Nassau in the State of New York as aforesaid, the defendant Daniel Carey as Commissioner of the Agriculture and Markets of the State of New York in cooperation with the Department of Agriculture of the United States through its Secretary of Agriculture, thereunto duly authorized by Statute (U. S. C. A., Title 7 Sections 147-a-147-e) quarantined the affected areas above described and commenced to exterminate the gypsy moth situated thereon by spraying the same with a chemical solution known as chlorophenothane commonly call 'DDT' in a mixture which was used at the rate of one pound per acre."

In view of the cited statutes of the State, we submit that the "cooperation with the Department of Agriculture of the United States" (as described in the quotation from the Answer) was a reasonable, lawful and fully authorized device for the performance by the Commissioner of Agriculture and Markets of the duties which the cited statutes imposed upon him.

(3)

Petitioners assert (pet., pp. 21-22) that control of the gypsy moth has been entrusted by the State of New York to the Conservation Department and not to the Department of Agriculture and Markets.

The respondent Commissioner of Agriculture and Markets, one of whose responsibilities is construing the Agriculture and Markets Law, has construed the law as authorizing him to "control and eradicate" (§ 164) the gypsy moth. It is true that the Conservation Law of the State of New York (Consol. Laws, ch. 65), in § 58 as amended by L. 1954, ch. 95, confers on the Conservation Commis-

sioner power to control and prevent the spread of "forest insects". But this does not derogate from the powers of the Commissioner of Agriculture and Markets to attack an insect which attacks (as, we submit, this Court may notice judicially) not only *forests* (the particular concern of the Conservation Department) but *orchards* as well. The District Court held with us on this issue of power. 164 F. Supp. 120, at p. 127.

(4)

Petitioners' reliance on *People* v. *Tremaine*, 252 N. Y. 27, 51, 168 N. E. 817 (1929), is misplaced. There the Court struck down a statute purporting to confer on the chairmen of certain legislative committees the power to segregate lump sum appropriations. This effected a sharp conflict with the constitutional provisions on the subject of the Budget (at that date, Art. IV-a, now Art. VII), and financial chaos would have resulted had the statute been upheld.

But to permit some overlapping of functions on the part of the two Departments with which we are here concerned would not produce chaos. Their devotion to, and responsibility for, the public welfare is equal. It is far better to tolerate a possible duplication than to sanction a situation such that, upon the emergence of a new pest, a declaratory judgment action would have to be begun and carried to the highest Court before it could be known whether the Conservation Commissioner or the Commissioner of Agriculture and Markets was endowed with the power to wield the Flit-gun; or, upon the discovery of a quantity of wormy fruit or nuts, which Commissioner possessed the power to order their destruction. We submit that the principle for which the *Tremaine* case is cited by the petitioners (pet.,

p. 22) has been neither ignored nor misunderstood by the Courts below.

Generally speaking, Conservation deals with wild life and natural resources, and Agriculture and Markets with domestic animals and planted crops. We submit that the proper drawing of the boundary line between these fields presents a question of local, not federal concern.

CONCLUSION

The petition for a writ of certiorari should be denied.

Albany, N. Y., February 8, 1960.

Respectfully submitted,

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